First Amendment

Leafleting

Defending Animal Rights Today and Tomorrow ("DARTT") was an organization concerned about, among other things, the treatment of circus animals. When the circus came to town, they decided to attend at the venue, the Verizon Center in the District of Columbia, to provide information concerning the treatment of such animals to circus patrons as they left the performance. DARTT members wore or held signs, displayed images on the side of the Verizon Center building with a video projector, used megaphones to amplify their spoken comments, and handed out leaflets. However, they were directed by Washington Sports and Entertainment (WSE) employees, security guards, and police officers to move their leafleting activity from their chosen location (under the overhang directly outside the Verizon Center doors) to other points on the F Street sidewalk, adjacent to the Center and some 20 feet away. The majority of the overhang location was public property as it was part of the sidewalk, but part of it — a recessed area directly outside the arena doors— was part of the Verizon Center leasehold.

Because so many patrons left the venue simultaneously immediately after the conclusion of an event, the period just after an event ended was when crowd control was most challenging, and pedestrian safety issues were most significant, around the F Street exterior doors. The group claimed that ten times as many people were taking fliers at this location as the location down the street. However, the sidewalk led directly to the entrance of the subway station, and a videotape submitted as evidence showed a large percentage of the arena patrons headed in that direction. The group sued, alleging that the defendants, WSE and the District of Columbia, violated its rights under the First Amendment because the protesters were directed to move their leafleting activity from their chosen location to other points on the F Street sidewalk. The defendants moved to dismiss or, in the alternative, for summary judgment.

The court granted summary judgment in favor of the defendants: "Since plaintiff's lawful protest activities were neither prohibited nor impeded, the First Amendment was alive and well on F Street in March of 2011." On the initial matter, the challenge that the plaintiff lacked standing to bring the lawsuit because it had only alleged a hypothetical future injury, the court determined that, as the same circus was scheduled to return to the District next year and annually, and DARTT claimed to have experienced similar restrictions when it leafleted at the circus for the past three years, it had sufficiently demonstrated standing.

On the merits, the law applicable to a traditional public forum was the law applicable here. The record did not clearly indicate where all of the protesters were located when they were directed to move. In any event, they were not simply instructed to move out of the recessed entrance, but were told they could not stand anywhere under the overhang. The court found the Verizon Center-owned strip was "seamlessly connected to the publicly-owned portion of the sidewalk." There was no evidence to suggest that the instructions the group received had anything to do with what it had to say. Accordingly, the order constituted a reasonable time, place, and manner restriction that served the government's interest in ensuring the safety of pedestrians, while it also permitted "the multi-faceted protest to continue unabated" and the message to be delivered. The evidence showed that DARTT's members "were not relegated to some distant location at the edge of the action, trying to flag down members of the crowd after they had already dispersed; they were standing in a sea of pedestrians even at their new location...Given the undisputed facts, ...it is difficult to find support for plaintiff's argument that its members' constitutional rights under the First Amendment were burdened at all, much less that they were burdened more than necessary." *Defending Animal Rights Today & Tomorrow v. Wash. Sports & Entm't, LP*, No. 11-0786 (ABJ), 2011 U.S. Dist. LEXIS 121347 (D. D.C. Oct. 20, 2011).

Personnel and Employment

Facebook & Employee Speech Rights

Mattingly was an at-will employee in the office of the Saline County Clerk until December 31, 2010. The office had nine full-time employees and a number of part-time employees. The County Circuit Clerk position was an elected one, and in 2010, Dennis Milligan beat the incumbent, Doug Kidd, as the new clerk. Mattingly supported Kidd and wore a Kidd campaign shirt to a parade. She saw Milligan there; he testified that he did not see Mattingly at the parade.

In December 2010, Milligan sent a letter to three full-time employees and one part-time employee informing them that their employment was being terminated. Mattingly was not one of these employees. The same day, some of the employees met after work at a restaurant. While at the restaurant parking lot, Mattingly made a post to her Facebook wall, using her mobile phone: "So this week not going so good bad stuff all around[.]" After someone responded, "Will be praying. Speak over those bad things positively[.]," she posted, "I am trying my heart goes out to the ladies in my office that were told by letter they were no longer needed ... It's sad[.]" Mattingly had 1,300 "friends" on Facebook, most of whom were County residents.

Apparently some of these friends also contacted Milligan. He testified that he received six calls on his home telephone from unknown constituents regarding Mattingly's Facebook post, with the callers criticizing him for firing four employees. The terminations also attracted local media attention (tv, newspapers, and an Internet blog). The next day, Milligan called Mattingly to discuss the posts and told her he did not believe that she could work for him. She was notified by letter that she, too, was being let go ("I respect your personal life and whatever you do or do not do is your business. The issue is when I have constituents calling me with concerns about comments you have made that are in a public domain."). Mattingly brought a Section 1983 lawsuit alleging she was terminated in violation of her rights to free speech under the First Amendment and Fourteenth Amendment, both for her support of Kidd and her Facebook posts.

Milligan moved for summary judg-

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ment, arguing the Facebook posts were not protected speech as they were too vague, did not touch on a matter of public concern (and had a private motive), and were "immediately disruptive" to him in his position as the prospective Circuit Clerk. Milligan also claimed entitlement to qualified immunity because no reasonable official could have known that the posts touched on a matter of public concern.

The court granted the motion, in part. There was no evidence that Milligan discharged Mattingly in retaliation for associating with supporters of Kidd and campaigning on his behalf, and Milligan's motion for summary judgment was granted with respect to Mattingly's free association and right to campaign claim. On the other claim, viewing the evidence in Mattingly's favor, her Facebook posts touched on a matter of public concern: County residents were sufficiently concerned about the terminations to contact Milligan with individual complaints, and news media reported on the terminations. In light of the context, content, and format of the Facebook posts, Mattingly's speech related to a matter of public concern. "Even if, as Milligan contends, Mattingly's Facebook posts were made primarily to further her private interest in receiving emotional support and affirmation, the fact remains that she did not make them as an employee but as a citizen." Although Mattingly's first post was vague, in the context and given the additional comment, it was clear it was a reference to the decision not to retain certain employees in the Circuit Clerk's office. Milligan himself—and, according to him, a number of his constituents—clearly understood the posts to refer to his termination decisions.

Milligan failed to point to any evidence that Mattingly's posts adversely affected the efficiency of the Circuit Clerk's office or caused any disruption at all. Bare allegations that the speech caused disruptions supported by minimal or no evidence was insufficient to invoke the *Pickering* balancing test. Milligan was not entitled to qualified immunity because, at the time Mattingly's termination occurred, it was clearly established that a public employer could not fire an employee for speech relating to a matter of public concern when that speech caused no disruption to the workplace. *Mattingly v. Milligan*, No. 4:11CV00215 JLH, 2011 U.S. Dist. LEXIS 126665 (E.D. Ark. Nov. 01, 2011).

Ex-Employee Must Provide Passwords, Login Information

In 2008, a related group of online marketing companies ("Ardis") hired Ashleigh Nankivell as a video and social media producer. All of the Ardis companies were wholly owned and collaboratively operated by its founder, Jordan Finger. Nankivell signed an agreement that stated that all work created or developed by her was the property of the employer, that she would return all confidential information to the employer upon request, and that "actual or threatened breach of [the agreement]" would cause the employer "irreparable injury and damage." Nankivell performed work for a number of entities in Finger's enterprises, including producing videos and maintaining websites, blogs, and social media pages in connection with the online marketing of the companies' products. She maintained passwords and other login information for websites, email accounts, and social media accounts, as well as for third-party servers where content was stored. Because her personal laptop crashed purportedly due to over-use from work-related tasks, the employer provided Nankivell with a used laptop as a replacement. She used this to store much of the work she did.

By 2011, Nankivell was looking for new employment, and was fired in June 2011, allegedly because the employer discovered she was looking for work. Finger requested the return of the laptop, as well as the access information and passwords. Nankivell, however, declined to return the computer and information, and the employer was unable to access a number of online accounts and websites to update them as needed for its marketing purposes. The employer also alleged that the laptop contained proprietary information that was otherwise unavailable to it. (Nankivell maintained that the laptop was synced with the desktop she used at work, so all of the work files on the laptop were within the company's control). The employer moved for a preliminary injunction against Nankivell, to require her to return the employer's login information for various websites, and return the laptop and its content.

The court ordered the return of the employer's access information. It was uncontested that the employer owned the rights to that information, and the employee's unauthorized retention of the information could, therefore, form the basis of a claim of conversion. However, the return of the laptop was not ordered. The employer had not demonstrated irreparable harm if the laptop was not returned, and "made no arguments whatsoever with respect to the computer itself; as a mass-produced object, its loss [was] clearly monetarily compensable." *Ardis Health, LLC v. Nankivell*, No. 11 Civ. 5013 (NRB), 2011 U.S. Dist. LEXIS 120738 (S.D.N.Y. Oct. 19, 2011).

Planning and Land Use

RLUIPA & Secular Uses

Calvary Christian Center ("the church") applied to the City of Fredericksburg for a special use permit to lease its church space to the operator of a private day-school for disabled children called Fairwinds, operated on a for-profit basis. The church believed that the Bible mandated that it have a "social ministry" and assist families in the area. It had previously obtained a special use permit to allow it to operate a before and after school day-care called Precious Moments Day Care. Fairwinds would have six full-time staff at the church, and would operate between 8:30 a.m. and 3:00 p.m., utilizing two classrooms and office rooms on the second floor of the church building. The council members rejected the application, referring to the number of group homes and group facilities already functioning in the area; the propriety of providing services to special-needs students from outside the area; the nature of the disabilities of the Fairwinds students; and the safety of the day-care students in the same building. The church sued, claiming that the City's decision violated the Americans with Disabilities